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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK ALTAN SMITH,

Defendant and Appellant.

D052471

(Super. Ct. No. SCD209404)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed.

Patrick Altan Smith appeals a judgment arising out of his conviction of multiple offenses, including selling cocaine base, possessing cocaine base for sale, and resisting an officer. He contends that the court erred in failing to sua sponte provide a unanimity instruction because the evidence disclosed two separate acts that could have formed the basis for his drug-related convictions. We affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

On the evening of September 27, 2007, police officers on bicycle patrol observed a group of individuals standing at the corner of 4th Avenue and C Street in downtown San Diego. The officers saw movement that looked like a hand-to-hand drug transaction. Their suspicions aroused, the officers approached the group, and Officer Michael Nigro positioned himself directly behind one of the individuals in the group. Officer Nigro watched as the individual handed a \$20 bill to another man, later identified as Smith. Smith then passed the individual a piece of what the officer believed was cocaine base.

When the officers announced their presence, the group scattered. Officer Nigro ordered Smith to raise his hands, and Smith failed to comply. Officer Nigro subdued Smith after a brief struggle, during which Smith dropped two chunks of cocaine base and a baggie containing cocaine base. In Smith's right front pocket, Officer Nigro found the \$20 bill that he had seen Smith take from the other individual in the group. Based on their observations and experience, the officers concluded that Smith acted as a seller of cocaine base in the transaction they witnessed.

An information charged Smith with one count each of selling cocaine base, possessing cocaine base for sale, and resisting an officer. A jury convicted Smith on all counts. The court sentenced Smith to prison for nine years.

## DISCUSSION

Smith contends the trial court committed reversible error by failing to instruct the jury with CALCRIM No. 3500, which would have informed the jury to unanimously agree on which acts constituted a sale of cocaine base and possession of cocaine base.

He asserts that either transaction witnessed by the officers could have formed the basis for his convictions on both counts. We reject this assertion.

The California Constitution requires a unanimous jury verdict to support a criminal conviction. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; see Cal. Const., art. I, § 16.) Where the defendant is charged with a single criminal act, but the evidence suggests multiple discrete instances of the act, "the prosecution must elect the specific act relied upon to prove the charge to the jury[.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The prosecution makes the required election by clearly indicating to the jury which specific act it relies on to prove the charge. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.) If the prosecution fails to do so, the court must instruct the jury on the unanimity requirement sua sponte. (*People v. Melhado, supra*, 60 Cal.App.4th at p. 1534; see CALJIC No. 17.01.)

Here, the prosecution elected the basis of the sale of cocaine base and possession of cocaine base for sale charges by specifically identifying the second, visible hand-to-hand transaction as the relevant "drug sale." In its summation, the prosecution referred to the initial movement that attracted the officers' attention only as "something going on that looked to [the officers] to be fishy," and something that "*looked* to them . . . to be a drug deal[.]" (Italics added.) In contrast, the prosecution described the second transaction in detail: "[W]hen Officer Nigro manages to walk up behind them and look over their shoulders, he sees exactly what's going on. . . . He sees a 20 leaving the hand of one man standing in the group and going over to the defendant. He sees the defendant taking that

20. He sees the defendant looking in his hand, picking out a rock and giving it to the guy who just gave him the 20. *A drug sale, that's what he sees.*" (Italics added.)

The prosecution reiterated its election by focusing exclusively on the second hand-to-hand transaction during its discussion of the charged offenses. (See *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1454-1455 [prosecution made election by referring to specific act in argument to jury]; *People v. Jantz, supra*, 137 Cal.App.4th at p. 1292.) The prosecution argued that the jury could find Smith guilty of selling cocaine base solely by reference to the second transaction: "How are you going to determine if he was selling? Look at the facts. He is facing a group of people that have their hands out. The focus is on him. He receives money from somebody. He's got the plastic, he's got the chunks [of cocaine base] in his right hand . . . . He gives one of those chunks over for the money." The prosecution pointed to the same facts in discussing the possession of cocaine base with intent to sell charge.

Contrary to Smith's assertions, defense counsel's closing argument did not create a risk of confusion. Defense counsel argued primarily that the officers testified inconsistently regarding the second, visible hand-to-hand transaction. Counsel only referred to the first transaction in passing. Because we conclude the prosecution elected to rely on the second transaction as the basis for the sale and possession for sale charges, the court did not err in failing to provide a unanimity instruction.

DISPOSITION

The judgment is affirmed.

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McINTYRE, J.

WE CONCUR:

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HALLER, Acting P. J.

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AARON, J.